Supreme Court, U.S.
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No. 92-858

In The

Supreme Court of the United States

October Term, 1992

WILLIAM C. McLEOD II,

Petitioner,

v.

FUMIKO I. McLEOD,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeals For The Fourth Appellate District, Division Three

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. WHETHER IT IS ERROR BY THE CALIFORNIA COURT TO DIVIDE THE MILITARY PENSION BETWEEN SPOUSES IN ACCORDANCE WITH STATE LAW, WHEN THE ISSUE OF THE COMMUNITY INTEREST IN THE MILITARY PENSION RIGHTS OF HUSBAND WAS RAISED BY THE WIFE, AND NO OBJECTION WAS MADE BY THE HUSBAND, THE MILITARY MEMBER, TO THE DIVISION OF THE RETIREMENT BENEFITS WHILE HE AGGRESSIVELY LITIGATED THE ISSUES OF THE DISSOLUTION FOR OVER TWO YEARS AFTER THE MILITARY PENSION ISSUE WAS RAISED.

PARTIES

All parties to the proceeding in the court whose judgment Petitioner seeks to review appear on the caption set forth on the cover of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

RESTATEMENT OF THE CASE 1

ARGUMENT 7

A. BILL CONSENTED TO THE JURISDICTION OF THE COURT 7

CONCLUSION 11

APPENDICES ..... App. 1

A. STIPULATION AND ORDER FILED 9/26/89 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Boone v. Lightner (1943), 319 U.S. 561 10

In re Marriage of Hattis (1987), 196 CA.3d 1162..... 8

In re Marriage of Lopez (1981), 115 CA.3d 776, 781, 173 Cal.Rptr. 718 10

In re Marriage of Tucker (1991), 226 CA.3d 1249, 277 Cal.Rptr. 43 .....7, 8

STATUTES

50 U.S.C., Appen., 510..... 9

I.

RESTATEMENT OF THE CASE

Petitioner, WILLIAM C. McLEOD, II ("Bill"), is an officer in the United States Air Force. Respondent, FUMIKO ISHII, aka FUMIKO I. McLEOD ("Fumiko"), is a Japanese naturalized American citizen who established California as her domicile when the parties were stationed in California in the late 1970's. The parties were married in Tokyo, Japan, on March 31, 1972.

In 1974, Bill was transferred by the Air Force to California. The parties bought a house in Apple Valley, California, and lived there for seven years, during which time their two children, Margaret McLeod and William Carl McLeod, III, were born (CT 14). In 1981, Bill was transferred to West Germany. The family moved to West Germany, however, retained the home in Apple Valley. In May, 1984, as a result of repeated physical abuse by Bill (CT 426, 427, 613), Fumiko returned to California, together with the children, and on June 4, 1984, filed a Petition for dissolution of marriage, together with an Order to Show Cause, requesting child custody, child support, spousal support, attorney's fees, and restraining orders, which was personally served on Bill in Germany.

Bill filed an affidavit with the court, requesting therein a stay pursuant to the Soldiers' and Sailors' Relief Act. The Court ordered the matter stayed until such time as the court is petitioned to appoint counsel for respondent. The court, however, ordered temporary custody of the children of the marriage to Fumiko and set spousal and child support, respectively.

On October 16, 1984, Fumiko petitioned the court to appoint an attorney to represent the respondent (CT 34), and the court appointed an attorney to represent the respondent in this matter. Due to Bill's complete failure to obey any of the court orders regarding support of the minor children and of Fumiko, a Writ of Execution was issued, and an Application for Earnings Withholding Order was filed. On January 30, 1985, the attorney for Bill filed a Response, making no objections therein to any lack of jurisdiction of the court over any of the parties' assets (CT 60).

On December 28, 1984, Bill, through his attorney, moved the court for an order to show cause to quash the writ of execution and the wage assignment heretofore issued. The motion was based on the allegation that the orders heretofore made by the court were in violation of the Soldiers' and Sailors' Relief Act. On March 5, 1985, the court denied the motion.

An at-issue memorandum was filed, and the matter was set for trial on July 22, 1985. Bill continued the trial date and hired new counsel of his choice. The trial was set for November, 1985.

Bill filed another motion to quash the writ of execution and to vacate or modify the temporary orders of July 9, 1984. On November 23, 1985, Bill personally appeared for the hearing on the motions. Both parties stipulated at that time to certain temporary orders regarding visitation, support and the management of community property, and reserved the issue of the validity of the July 9, 1984 orders to the time of trial. Bill did not object to the jurisdiction of the court in the stipulation regarding his

military pension. (CT 172-175). In the stipulation of November 21, 1985, the court reserved only one issue regarding its jurisdiction, and that was the validity of the pendite lite order, which was issued July 9, 1984.

The litigation went unabated for seventeen months. The parties disagreed over visitation and child support and their voluminous items of personal property; the trial was continued several times by agreement. On April 20, 1987, a settlement conference was scheduled. Fumiko filed a settlement statement which, for the first time, mentioned Bill's military retirement, listing it as a community asset subject to division by the Court under California law. Bill did not file any response nor did he object (Petitioner's Appendix B, page 3).

The settlement conference was unsuccessful, and trial was again continued repeatedly by agreement of the parties.

In July, 1987, Bill moved for a modification of the visitation and child support order; he did not raise any objection to jurisdiction over his military retirement, either in his moving papers or at the time of oral argument.

The parties continued to disagree over visitation and child support payments. In May, 1988, upon motion by Fumiko, venue was changed to Orange County Superior Court. In November, 1988, the matter was bifurcated, and the dissolution as to status was granted. Although Bill filed numerous declarations with the court regarding a variety of matters, he never objected to jurisdiction over his military retirement.

In March, 1989, a hearing was held on the only reserved issue, that being the validity of the July, 1984 temporary orders and Bill's rights under the Soldiers' and Sailors' Relief Act. In his supporting points and authorities, Bill, for the first time in these five years of ongoing litigation, mentioned his military retirement and argued that the court had no jurisdiction over the issue under federal law. The court refused to discuss the retirement issue, however, stating, " 'I want the record to be real clear, the issue of whether or not the court has jurisdiction over the military pension was not a matter that was reserved in 1985. So that's not a motion that is before the court . . . It was never raised until you filed your points and authorities today. But you never made any motion concerning that. I have reviewed everything that you have submitted.' Bill's counsel concurred with the court's observation." (Court of Appeal Opinion, Pet.App. B, page 4)

The court ruled that petitioner properly filed for dissolution in the State of California, that in personam jurisdiction existed over the respondent in 1984, at the date of filing of the petition, based on his joint ownership of real property and bank accounts in California and his previous period of residence during which the parties' children were born. The court found further that the July 9, 1984, orders were void because the proceedings had been stayed under the Soldiers' and Sailors' Act, but Bill's appearance and stipulation to the court's orders in November, 1985, was a general appearance and constituted Bill's consent to all subsequent proceedings. He stipulated to certain orders, which conferred his consent to this proceeding and all orders resulting thereafter.

On September 26, 1989, the matter was assigned to trial, by stipulation, to Judicial Arbitration. By stipulation, the Honorable J.E.T. Rutter was to act as Judge Pro Tem. Bill insisted, despite the prior ruling of the court that he had failed to reserve jurisdiction over his military pension, to bring up his military pension at trial. Fumiko did not wish to pay the private arbitration judge for time spent on an issue that she believed was already adjudicated. Thus, the parties agreed to allocate the cost in the following stipulation:

> "Parties and attorneys stipulate to have the entire matter assigned to JAMS – Judge Rutter. Respondent to be fully responsible for that part of the fees for JAMS in connection with the following issues: 1. Custody, child support, spousal support; 2. Military pension v. sep. property retainer pay; 3. Residence in Apple Valley; 4. Division of property and reimbursement, characterization: Sep. v. comm. property, tax issue, division of community debts, cost of shipping personal property, attorneys fees and cost incurred. The following issues shall be decided and each party shall bear the cost in connection with said issues due JAMS as the court may decide: 1. Furniture and Furnishings; 2. Military collection; and 3. Tracing bank accounts . . . "

Both parties and their attorneys signed the stipulation. The court approved the stipulation, making it an order of the court.

(The stipulation is attached as Respondent's Appendix A)

This issue was not raised by Bill in his statement on appeal. Only once a decision was made by the Appellate Court did Bill raise the issue for the first time in his Petition for Rehearing, which was denied.

The matter was tried in September, 1990, and the court found personal jurisdiction and jurisdiction to divide the military retirement benefits because Bill failed to lodge an objection to the jurisdiction of the court to divide the benefits by reason that the issue was raised by Fumiko for the first time on April 20, 1987, and not objected to by Bill until March, 1989, when he raised the issue in response to a hearing, some two years later.

The Court of Appeal affirmed on May 29, 1992, and denied rehearing on July 2, 1992. The court determined that, while Bill did not have an affirmative duty to raise the issue of non-consent over his military pension, . . . "but in contrast to the spouse in *Tucker*, Bill continued to aggressively litigate the case for over *two years* after Fumiko listed the benefits as an asset in her settlement statement without mentioning his objection to its division. In our view, this amounts to the consent contemplated by FUSFSPA." (Court of Appeal Opinion, p. 9).

II.

ARGUMENT

A. BILL CONSENTED TO THE JURISDICTION OF THE COURT

No contention is made by Respondent Fumiko that the Petitioner was domiciled in California or resided in California at the time of the filing of the dissolution. Her sole contention is that Petitioner consented to the jurisdiction of the court. Petitioner cites *In re Marriage of Tucker* (1991), 226 CA.3d 1249, 277 Cal.Rptr. 43, as a case which is remarkably similar to the present case. The service member in *Tucker* maintained a domicile in a different state, but owned a community property house in California. And, the service member *Tucker* stipulated, pendente lite, to temporary orders concerning custody and support, and he subsequently fully litigated the case. The Court refused to divide the military pension and declared it had no jurisdiction.

However, the analogy ends here.

At all stages of the proceeding, Mr. Tucker raised an objection. At the first appearance on November 29, 1989, where Mr. Tucker entered into a stipulation and order to show cause, which temporarily awarded physical and legal custody of their children to the wife and which provided her $500 a month in child and spousal support, the stipulation stated, "Jurisdiction question over retired pay reserved." (*Tucker, supra,* p. 1252).

Thereafter, Mr. Tucker filed a Response to the Petition on January 10, 1989. The Response asked the Superior Court to confirm Mr. Tucker's military retirement pay as

his separate property, to make a declaration regarding the parties' community and quasi-community property, including proceeds from the sale of the parties' California residence, to award joint legal and physical custody of the parties' children, and to make an award of child support. However, the Response clearly set forth "Respondent's military retirement pay not subject to California jurisdiction – Please see declaration of Fletcher S. Tucker incorporated herein." (*Tucker, supra,* page 1253)

Tucker, supra, page 1255, discusses a service member's right under FUSFSPA, whether a service member who consents to the jurisdiction of the trial court regarding property rights, child custody, and support issues, has also consented to the jurisdiction of the trial court within the meaning of FUSFSPA. Citing *In re Marriage of Hattis* (1987), 196 CA.3d 1162, the court in *Tucker* states, on page 1256:

> "A member of the military such as Fletcher may both agree California has jurisdiction over non-pension issues and at the same time argue California has no power to divide his or her military pension."

And on page 1258, the court continues:

> "Having determined Fletcher could raise his FUSFSPA defense while tendering other issues to the trial court, and do so in his response to Classie's petition, we have little doubt his response in fact preserved the defense. As the record indicates, Fletcher's counsel raised the issue at every stage of the proceedings – in his initial conversation with counsel, in the stipulated order and order to show cause, and in the response. The fact that Fletcher's response also

> asked the trial court to confirm the retirement benefits as his separate property must be read in conjunction with his repeated and unequivocable reliance on FUSFSPA. Seen in that light, we interpret the request for confirmation as a conditional request made only in the event the FUSFSPA defense was not successful."

In the present case, neither Petitioner's Response, nor the stipulation he entered into with his new counsel on November 21, 1985, nor any document thereafter, set forth these objections to the jurisdiction over the military retainer pay by the California court.

During the many years of litigation, Petitioner never attempted to amend his Response, to set forth, as Mr. Tucker did, that the jurisdiction over his retirement pay is reserved; nor did he reserve in his stipulation, filed November 21, 1985, an objection to the court's jurisdiction over his retirement pay.

All Petitioner ever raised was an objection under the Soldiers' and Sailors' Relief Act, stating that he could not proceed in court by reason of his absence from the court and his membership in the military service. Even that objection was abandoned after the stipulation on November 21, 1985 was entered.

Petitioner contends that his repeated objections to the proceedings under the Soldiers' and Sailors' Act were sufficient to preclude a finding of consent under FUSFSPA. But the Soldiers' and Sailors' Act provides for the "temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in (military) service . . . " (50 U.S.C., Appen., 510).

These protections, enacted in 1940, are addressed to jurisdiction generally and cannot be interpreted to apply to the specific requirements of FUSFSPA.

In *In re Marriage of Lopez* (1981), 115 CA.3d 776, 781, 173 Cal.Rptr. 718, the court discusses the Soldiers' and Sailors' Relief Act and its effect on court orders:

> " . . . The Supreme Court, in summarizing and applying the pertinent provisions of the Act, stated: 'Section 520 provides that if there is a default of appearance by the defendant in any proceeding, plaintiff shall file an affidavit showing that the defendant is not in the military service. If such affidavit cannot be filed, plaintiff must file an affidavit showing that the defendant is in the military service, or that plaintiff is unable to determine whether or not the defendant is in such service. If an affidavit cannot be made showing that the defendant is not in the service, the court shall not enter the entry of judgment without appointing an attorney to represent defendant and protect his interests . . . "

On page 782, the court in *Lopez* states:

> "The bounds of judicial discretion with respect to the Soldiers' and Sailors' Relief Act have been explored by the United States Supreme Court in *Boone v. Lightner* (1943), 319 U.S. 561, wherein the court observed: 'The Soldiers' and Sailors' Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result

> from absence, or absence results from the service. Absence when one's rights or liabilities are being adjudged is usually prima facia prejudicial. But in some few cases, absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.' "

Reviewing the record, it is clear that Petitioner objected to being absent in the court proceeding in 1984, that Respondent moved promptly to have an attorney appointed for him, and that an attorney was appointed for him who acted to protect his rights. However, reviewing the objections Petitioner filed with the court, nothing challenges the jurisdiction of the court with respect to jurisdiction over his military pension, and Petitioner's contention that he did not consent to the jurisdiction of the court by reason that he filed objections requesting his rights under the Soldiers' and Sailors' Relief Act in the year 1984 do not amount to a challenge of the court's jurisdiction over Petitioner's military retirement.

III.

CONCLUSION

After the issue of the military pension rights were properly raised by Respondent, Petitioner failed for some two years of vigorous litigation to object to California's jurisdiction over his military pension rights. Petitioner asserts that he objected under the Soldiers' and Sailors' Act to jurisdiction. However, the Act does not address this issue. Thus, Petitioner presents nothing to warrant a

grant of certiorari, and the Court should thus deny the petition.

DATED: December 17, 1992.

Respectfully submitted,

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APPENDIX A

STIPULATION

(Filed September 26, 1989)

Case No. D-29-01-45 Fumiko I. McLeod and William C. McLeod II

9-26-89, p.m., Dept. 10

Petitioner/wife present represented by Atty. Peter Wernicke
Respondent/husband present represented by Atty. Wilma Presley

THE PARTIES HEREBY STIPULATE AND AGREE that

X OTHER:

Parties and attorneys stipulate to have the entire matter assigned to JAMS – Judge Rutter. Respondent to be fully responsible for that part of the fees for JAMS in connection with the following issues: 1. Custody, child support, spousal support; 2. Military pension v. sep. property retainer pay; 3. Residence in Apple Valley; 4. Division of property and reimbursement, characterization: Sep. v. comm. property, tax issue, division of com. debts, cost of shipping personal property, attorneys fees and cost incurred.

The following issues shall be decided and each party shall bear the cost in connection with said issues due JAMS as the court may decide: 1. Furniture and Furnishings; 2. Military collection; and 3. Tracing bank accounts. parties to pay each one half in advance. Husband shall advance the cost of the court reporter without prejudice.

Ret. Judge Rutter shall act as Judge Pro Tem.

/s/ Wilma Presley
/s/ William C. McLeod II
/s/ Peter Wernicke
/s/ Fumiko Ishii McLeod

IT IS SO ORDERED ON THE 26TH DAY OF SEPTEMBER, 1989.

/s/ Robert D. Monarch
Judge of the Superior Court